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IN THE

# Supreme Court of the United States

October Term, 1974.

## No. 73-1908.

STEWART S. CORT, LEWIS W. FOY, EDWARD D. BICKFORD, BERNARD D. BROEKER, ALBERT M. REED, C. THOMPSON STOTT, IVOR D. SIMS, CROWDUS BAKER, JESS H. DAVIS, THOMAS S. GATES, ROBERT B. HOBBS and GEORGE P. JENKINS, All Being Directors of BETHLEHEM STEEL CORPORATION,

and

BETHLEHEM STEEL CORPORATION,
*Petitioners,*

*v.*

RICHARD A. ASH, on Behalf of Himself, and on Behalf of BETHLEHEM STEEL CORPORATION.

**On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.**

# REPLY BRIEF FOR PETITIONERS.

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*Petitioners,*

*v.*

RICHARD A. ASH, ON BEHALF OF HIMSELF, AND ON BEHALF OF BETHLEHEM STEEL CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

## REPLY BRIEF FOR PETITIONERS.

The core considerations which compel reversal of the result reached by a divided court below remain essentially uncontradicted in the briefs urging affirmance.[1]

**I. There Is No Basis for Implication of a Private Right of Action for Voters, Citizens and Stockholders From 18 U. S. C. § 610.**

In view of Respondent's silence, Petitioners assume it is undisputed that, within the four corners of the Federal Election Campaign Act of 1971 ("FECA"), as a whole, and within § 610, in particular, there is nothing which evidences any Congressional intent to authorize a private suit by any voter or stockholder to seek injunctive relief to restrain, in advance, publication by a corporation of a speech on issues of public concern, or a stockholder's suit for the amount of an expenditure for such publication.

It is similarly undisputed that there is not a word in the legislative history of the FECA, or in the 68-year history of Congressional attention to § 610, which evidences any Congressional intent to authorize such suits.

It is undisputed that there is no general jurisdictional grant either in the FECA or in § 610, as in *J. I. Case Co. v. Borak*, 377 U. S. 426 (1964), which could be construed as a Congressional grant of subject-matter jurisdiction over any such category of "voter" suits or stockholder suits.

Respondent specifically acknowledges, further, that "the *primary* purpose of § 610" is not related to the

1. Petitioners file this brief in reply to the Brief for Respondent, Richard A. Ash ("Ash"), the Brief for the United States as *Amicus Curiae*, and the Brief for *Amici Curiae*, Judith Bonderman, et al. Since the Motion of Common Cause for leave to file a brief, as *amicus curiae*, was denied, by Order dated February 18, 1975, Petitioners make no reply thereto. In references to the briefs in the following discussion "R. Br." denotes "Brief for Respondent," "G. Br." the "Brief for the United States as *Amicus Curiae*," "B. Br." the "Brief for *Amici Curiae*, Judith Bonderman, et al.," and "P. Br." the "Brief for Petitioners."



interests of stockholders, at all, that purpose being rather "to prevent corporations and labor unions from influencing federal elections" (R. Br. at 21).

The judicial "implication" which Respondent attempts to defend is thus based on what is, at best, a secondary purpose of the Act and is not supported by any indication of Congressional intent to authorize stockholder's suits or suits by voters under the Act.

Of further significance, distinguishing this case from *J. I. Case Co. v. Borak*, 377 U. S. 426 (1964); *Wyandotte Transportation Co. v. United States*, 389 U. S. 191 (1967) and *Allen v. State Board of Elections*, 393 U. S. 544 (1969), relied on by Respondent, is the circumstance that here, although it has filed a brief in this case, the Government does not state that its resources to enforce § 610 are in any way inadequate and does *not* ask the Court to supplement the machinery for enforcement of § 610 by creating the private right of action sought by the Respondent. *See, Allen v. State Board of Elections, supra*, 393 U. S. at 557 n. 23; *Holloway v. Bristol-Myers Corporation*, 485 F. 2d 986, 1001 n. 74 (D. C. Cir. 1973). The Government's brief as *amicus curiae* confines itself exclusively to an attempted defense of the constitutionality of § 610.

Important arguments remain unanswered by Respondent's brief. Thus, no attempt whatever is made to detract from the controlling authority of cases such as *Calhoon v. Harvey*, 379 U. S. 134 (1964); *T. I. M. E., Inc. v. United States*, 359 U. S. 464 (1959); and *Nashville Milk Co. v. Carnation Company*, 355 U. S. 373 (1958), holding that where, as here, Congress has expressly provided a particular civil remedy in one title of an act, but not in another title of the same act, it is to be inferred that Congress did not intend a civil remedy in the title in which it did not expressly provide for one. Indeed, Respondent's

brief does not even cite these cases, much less attempt to distinguish them. In view of Respondent's silence, we merely reiterate our reliance upon them.

Significantly, Respondent has not attempted to refute any of the constitutional reasons (P. Br. at 40-45) for refusing to "imply" from a vague and overbroad statute, such as § 610, a private right to bring suits for the avowed purpose of stifling and deterring expression on public issues.

Again, Respondent urges the Court judicially to expand the coverage of § 610 to subsume a new remedy not provided by Congress, but offers no solution to the inevitable partisan abuse of such a remedy, which would invite a flood of frivolous suits brought by like-minded voters, stockholders and union members seeking sensational publicity on the eve of federal elections. The considerations which led the Court in *Nashville Milk Co. v. Carnation Company, supra,* 355 U. S. at 377, 378, to deny a private right of action under the criminal provisions of § 3 of the Robinson-Patman Act, have even greater weight in this case, where First Amendment concerns predominate:

> ". . . Section 3 contains only penal sanctions for violation of its provisions; in the absence of a clear expression of congressional intent to the contrary, these sanctions should under familiar principles be considered exclusive, rather than supplemented by civil sanctions of a distinct statute. See D. R. Wilder Mfg. Co. v. Corn Products Ref. Co., 236 U. S. 165.
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> • • •
>
> *"It is not an idle conjecture that the possibility of abuse inherent in a private cause of action based upon this vague provision was among the factors which led Congress to leave the enforcement of the provisions of § 3 solely in the hands of the public authorities . . . ."*



As the legislative history of the Federal Election Campaign Act Amendments of 1974 ("FECAA") and the provisions of both the FECA and the FECAA show (P. Br. at 27-33), the inevitable abuse inherent in a private cause of action under the unconstitutionally vague and overbroad provisions of § 610 was a prime motivating factor behind Congress' deliberate choice to withhold a private right of action and limit the power of enforcement of this provision to responsible public officials.

Apart from the fact Respondent ignores the controlling decisions, disregards the important constitutional considerations which rule out an "implied" private right of action under the circumstances of this case, and offers no answer to the decisive problem of inevitable abuse of such a remedy, the arguments Respondent does offer to defend "implication" of a private right of action from § 610 proceed from fundamental misconceptions of the decisions relied upon, faulty reasoning in their application, and an erroneous reading of the plain language of the statute itself.

### 1. Respondent Erroneously States the Rule of the Decisions on Which He Relies.

Following the majority opinion below, Respondent argues (R. Br. 17) that, assuming a statute "was intended to protect a class of persons, including the plaintiff, from the harm of which plaintiff complains," a private right of action for damages may be "implied" therefrom whenever a federal court deems it *"appropriate"* to do so. In support of this proposition, Respondent quotes approvingly (R. Br. at 18) from Mr. Justice Harlan's concurring opinion in *Bivens v. Six Unknown Agents,* 403 U. S. 388 (1971), a case distinguishable from the case at bar on grounds set forth in Petitioners' principal brief (P. Br. at 33-35). The

quoted language, however, contradicts the rule as stated by Respondent, establishing, in contrast, the more exacting requirement that there be a showing that the remedy sought is "*necessary* to effectuate the congressional policy." 403 U. S. at 403.

**2. The Majority Decision Below Rests Upon an Improper Analysis of the "Ambit of Protection" of § 610.**

The complaint in this case alleges that Respondent sues (1) individually in his capacity as a citizen and registered voter, and (2) by virtue of the fact he is a stockholder, in a derivative capacity on behalf of Bethlehem (Complaint, paragraph 8; A71). The action is not brought as a class action.

The majority below concluded (A100-102) that Respondent is a member of two classes of intended beneficiaries of § 610 and that, therefore, the first requirement of implication is satisfied in two ways. It is submitted that the majority's conclusion is in error in both respects.

The majority concluded (A100-101), and Respondent argues here (R. Br. at 19-20), that "the primary purpose of § 610 is to prevent corporations and labor unions from influencing federal elections" (R. Br. at 21). Accepting this characterization of the purpose of § 610, the majority deduced that the class of intended beneficiaries of § 610 consists of the class of all citizens and voters in the United States (A101). The majority concluded, therefore, that every citizen and voter in the United States has a private right of action under § 610, assuming a private right of action satisfies the second requirement of being "appropriate" (A100-101). Since Respondent is a citizen and voter the Court inferred that he has a private right of



action under § 610. As Judge Aldisert properly noted in his dissenting opinion (A113-115), the unrestrained approach to implication adopted by the majority leads to the result that "given particular circumstances, a remedy could be fashioned to afford civil relief upon the breach of every criminal statute." Petitioners agree and submit, for this reason, that the majority's conclusion on this point is in error.

The second phase of the analysis, based on the opinion of the majority below, is also misconceived. Respondent acknowledges (R. Br. at 21) that "the *primary* purpose of § 610" is unrelated to the interests of stockholders at all. He argues, however, that a peripheral purpose of § 610 was the protection of the interests of minority stockholders and labor union members and that a private right of action may therefore be "implied." Putting to one side the impropriety of "implying" a private right of action on the basis of an admittedly peripheral purpose, the majority's conclusion (A101) that Respondent has a *derivative* private right of action under this peripheral purpose of § 610 fails to take account of the fact that since Respondent sues *derivatively*, not on behalf of a class of such minority stockholders, he assumes the position of the corporation, pursuing against the directors a claim belonging to the corporation. Even under the expansive approach adopted by the majority below, a necessary precondition to its conclusion (A101, n. 4) that Respondent has a derivative private right of action would be a finding that the *corporation* is within the class of intended beneficiaries of § 610. Corporations, however, are the subjects of § 610's prohibition, and are obviously not within the class of intended beneficiaries of the Act. Accordingly, Petitioners respectfully submit that the result reached by the majority below is erroneous.

**3. The Conclusion That a Private Right of Action Is "Appropriate" Is Unconsidered and Unfounded.**

In an attempt to establish the second requirement of the inapplicable rule on which he relies, Respondent next argues that implication of a private right of action for every voter, citizen and stockholder for injunctive relief and damage is "appropriate."[2]

In support of this conclusion, Respondent offers five reasons. First it is argued that the agencies charged with enforcement of § 610 lack adequate resources to fulfill this duty. Unlike *J. I. Case Co. v. Borak, supra,* and *Allen v. State Board of Elections, supra,* however, in this case the Government does not support this ground for implication. The Government does not ask this Court to supplement the machinery for enforcement of § 610. In view of the Government's position and in view of the elaborate statutory scheme for civil and criminal enforcement of § 610 recently enacted by Congress in the FECAA, Respondent's contention in this regard is particularly ill-founded.[3]

Respondent's next argument turns on a misreading of the statute itself. Thus, it is argued (R. Br. at 23, 27) that the criminal sanctions provided in § 610 have an "insufficient deterrent effect" because, Respondent suggests, those sanctions are applicable only to the corporations, not to the directors and officers, and are thus, in effect, "imposed on the innocent stockholders" (R. Br. at 24). Section 610 itself provides the refutation of this assertion. It provides that any *officer* or *director* who consents to an illegal expenditure is criminally liable and is subject to a jail sentence of up to two years.

2. As noted above, Mr. Justice Harlan's concurring opinion in *Bivens v. Six Unknown Agents, supra,* which is quoted in part by Respondent, establishes that, where applicable at all, the rule requires that the remedy sought be *"necessary,"* not merely *"appropriate."*

3. The creation of the Federal Election Commission under the FECAA also bears significantly on the *in*appropriateness of a private right of action under § 610. It draws into play the rule of caution against implication of private remedies overlapping the jurisdiction of federal agencies in circumstances where private actions may have a disruptive effect on administration of the regulatory scheme. *See, Holloway v. Bristol-Myers Corporation,* 485 F. 2d 986 (D. C. Cir. 1973).



Following the majority below (A104) Respondent next argues (R. Br. at 24) that the supposed efficacy of swift civil injunctive relief to halt publication of a speech on public issues makes a private civil remedy under § 610 "appropriate" and superior to the criminal sanctions expressly provided by Congress. This rationale, however, is constitutionally impermissible, because such injunctive relief would be barred by the doctrine forbidding prior restraints. *New York Times Co. v. United States,* 403 U. S. 713 (1971); *Organization for a Better Austin v. Keefe,* 402 U. S. 415 (1971); *Near v. Minnesota,* 283 U. S. 697 (1931).

Next, Respondent argues (R. Br. at 22) the "problem of selective enforcement" provides a reason why implication of a private right of action is "appropriate." In this assertion, which is based only on the statement of the majority below that a "possible conflict of interest" on the part of officials charged with the duty of enforcing § 610 "is not simply hypothetical" (A103), Respondent asks the Court to immortalize as an assumption underlying its ruling the proposition that public officials sworn to uphold and enforce the law will regularly and systematically violate the oath of office. Quite apart from the evident impropriety of such an assumption, implication of private remedies from criminal statutes is not the established remedy for misconduct of federal prosecutorial officers. The same dubious rationale of partisan enforcement would broadly justify judicial "implication" of private causes of action from every criminal statute.

The majority's suggestion (A103), as a basis for implication of a private right of action, that violations of § 610 are "acts more likely to be covert than notorious" prosecution of which would be aided by private enforcement, overlooks the fact that what is challenged in this case was the *publication* in newspapers and magazines of expression on public issues.

Sidestepped in this catalog of "reasons" why implication is "appropriate" under § 610 is the question whether alternative remedies exist under state law. On this score, Respondent has in another argument undercut completely the asserted "appropriateness" or "necessity" of a private right of action under § 610. Respondent calls to this Court's attention (R. Br. at 47) the fact that the very same court which has, in this case, held that there exists an *"implied"* right of action under § 610, subsequently held that there *also* exists a private, *state* cause of action for expenditures in violation of § 610. *Miller v. American Telephone and Telegraph Co.*, No. 73-2007 (3d Cir. Opinion filed Nov. 4, 1974).

The test of "appropriateness," moreover, assumed in Respondent's analysis, is not only at odds with the decisions on which Respondent relies, but entails an assessment essentially alien to the judicial function. Institutional disabilities inherent in the nature of the judicial process dictate that the judgment on the "appropriateness" of remedies provided or not provided by Congress is one properly for Congress—not for the federal courts—to decide. This practical conclusion is reinforced by the doctrine of separation of powers.



**II. This Court Should Not Consider Respondent's Extraneous Arguments Against Summary Judgment Which Were Not Raised in the District Court, Not Assigned as Error in the Court of Appeals, and Not Fairly Within the Questions Presented by the Petition for Certiorari.**

Respondent devotes nearly ten pages of his brief to a discussion of two points which are not properly before the Court and should not be considered.

For the first time in the history of this controversy, Respondent argues (R. Br. at 47-54) that the District Court's grant of summary judgment was improper because "there was an additional theory of recovery cognizable in federal court independent of the implication of a private cause of action" (R. Br., "Questions Presented"). That argument presents the view that the federal district courts have jurisdiction under 28 U. S. C. § 1331 over suits by stockholders asserting a state-created right which arises out of an alleged violation of a federal statute. Putting to one side the fact that, after the district court had required the posting of security for expenses *with regard to Respondent's claim under state law* (A68), Respondent filed his First Amended Complaint (A69-A75) which eliminated his alleged, state-created cause of action, the question Respondent is belatedly attempting to inject here is not properly before this Court for consideration or decision.

Rule 23(1)(c) of the Rules of this Court provides that "only the questions set forth in the petition or fairly comprised therein will be considered by the court." The questions presented by the petition for a writ of certiorari in this case do not even remotely touch upon whether federal courts have subject-matter jurisdiction, absent diversity of citizenship, because this stockholder's suit allegedly "arises under the Constitution, laws, or treaties of the United

States," 28 U. S. C. § 1331. Indeed, Respondent's "Counter-Statement of Questions Presented" in his brief in opposition to the petition, treats only two issues *viz.* whether the Court of Appeals correctly implied a private right of action under 18 U. S. C. § 610, and whether it properly remanded for a determination of whether the expenditures in question were made for a "partisan purpose."

The issue was neither raised nor argued nor decided in the district court. Respondent did not include the question in his statement of issues to be presented for review before the Court of Appeals (A90-A91). The issue was not briefed or argued before the Court of Appeals. The opinions in the Court of Appeals are silent with regard to it. Absent special circumstances, not involved in this case, the uniform practice of this Court has been to disregard such additional questions smuggled into a case after the grant of certiorari. *Neely v. Martin K. Eby Construction Co., Inc.*, 386 U. S. 317, 330 (1967); *Lawn v. United States*, 355 U. S. 339, 362, n. 16 (1958); *California v. Taylor*, 353 U. S. 553, 556 n. 2 (1957); *Irvine v. California*, 347 U. S. 128, 129 (1954).

In the same category of belated attempts to transform the posture of the case in this Court is Respondent's suggestion (R. Br. at 3, 45-46) that this case involves more than the Advertisement, the Speech and the Folder which have been the focus of the case since the day the complaint was filed, and therefore, that the grant of summary judgment was error by reason of the existence of unresolved factual issues. It suffices to say that the opinions in the Court of Appeals did not consider any of Respondent's manufactured factual issues and they should not be considered here. The majority opinion below simply summarized the case as follows (A93): "Plaintiff asserts that the corporate expenditures, for an advertisement and a



pamphlet, violated a federal prohibition on corporate campaign spending, 18 U. S. C. § 610 (1970) as amended (Supp. II 1972)." Respondent filed no Petition for Rehearing.

Moreover, Respondent's assertions are belied by the manner in which the case was presented in the Court of Appeals and in the District Court. Respondent urged the Court below, for example, in his Petition for Rehearing of the appeal from the denial of a preliminary injunction, to decide the entire case on the papers (Petition for Rehearing dated January 19, 1973, at 4). Respondent stated in support of this request that there had been a "full hearing on the issues at the district level" (*id.* at 4), that "the complaint set forth very specific acts of defendants" and summarized his case (*id.* at 4):

> "Simply put, Appellant alleged that Bethlehem Steel *was carrying out illegal advertising.* Appellees agreed that the advertising was being carried out but disagreed that it was illegal." (Emphasis added.)

It is submitted that the additional, extraneous issues Respondent now attempts to inject are not properly before this Court and should not be considered here.

## III. On Its Face and as Construed and Applied by the Majority Below, § 610's Prohibition, Directed Only Against Labor Unions and Corporations, Deprives Labor Unions and Corporations of Equal Protection of the Laws in Violation of the Fifth Amendment.

Not surprisingly, neither the Government nor the Respondent questions the proposition that corporations and labor unions are entitled to equal protection of the laws. The decisions of this Court definitively establish that right. *Grosjean v. American Press Co., Inc.*, 297 U. S. 233, 244 (1936); *Louis K. Liggett Co. v. Baldridge*, 278 U. S. 105

(1928); *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 389 (1928).

It is argued, however, that since § 610 does not create an inherently suspect classification, "it cannot be held to violate the due process clause unless no rational basis for the statute may be discerned" (R. Br. at 69). Proceeding from this premise, Respondent attempts to establish that the challenged classification has some rational basis. It is submitted, however, that the offered analysis begins and ends in error.

Legislative classifications aimed at selective prohibition of conduct protected by the First Amendment are not judged by the less exacting standard of "rational relationship" to a legitimate interest. Like "inherently suspect" classifications, classifications which are the basis for selective prohibition or regulation of activity protected by the First Amendment are subject to a more searching standard of judicial review. A claimed justification for selective exclusion from the public forum is to be "carefully scrutinized." *Police Department v. Mosley*, 408 U. S. 92, 98-99 (1972). Differential treatment can be justified in this "First Amendment—Equal Protection intersection" only upon a showing of a *compelling* governmental interest in the discriminatory treatment. *See, Williams v. Rhodes*, 393 U. S. 23, 31 (1968).

As the briefs of Respondent and the Government persuasively demonstrate, no such compelling governmental interest justifies the arbitrary and invidious classification upon which § 610's criminal prohibition is based. They demonstrate, on the contrary, that the discriminatory classification of § 610 is irrational, unreasonable and legitimated by relationship to no governmental interest at all, much less a compelling one. While the Government argues that it is "rational to hold corporations and labor unions to a different and more stringent standard" (G. Br. at 35),



the Government does not explain why it is "rational" that more than 50 common-law trusts and voluntary associations listed on the New York Stock Exchange which are not corporations should have the ability to make expenditures to participate in public debate on governmental issues, to reply to statements and accusations levelled by politicians seeking federal office and to make contributions, all exempt from § 610's criminal prohibition. It is just as plain that there is no "compelling governmental interest" which justifies the exemption from § 610 of numerous real estate investment trusts some having assets in excess of hundreds of millions of dollars, the exemption of limited partnerships, associations, and other unincorporated business entities, or the exemption of the medical, farm and other organizations which actively participate in debate on public issues. Indeed, the unconstitutional rationale of § 610 cannot rationally be confined to corporations and labor unions, but logically extends to every type of business organization and association and to all aspects of public debate to "justify" stifling the flow of politically relevant information to the public. Section 610's selective prohibition bears no rational relationship to *any* governmental purpose and that prohibition plainly denies equal protection of the laws to labor unions and corporations.

## IV. On Its Face and as Construed and Applied by the Majority Below, § 610 Is Violative of the Freedoms of Speech, Press, Petition and Association Guaranteed by the First Amendment.

In defense of § 610, both Respondent (R. Br. at 55-60) and the Government (G. Br. at 26-29) urge that corporations should not be afforded full protection of the First Amendment. No decision of this Court is cited in support

of the proposition that corporations do not enjoy the full protection of the First Amendment. As demonstrated in the Petitioners' principal brief (P. Br. at 63-64), the decisions of this Court are to the contrary. In a series of inapposite citations, the Government shows that newspapers are subject to the antitrust laws, newspapers are subject to the National Labor Relations Act and that corporations do not enjoy the protection of the Fourth and Fifth Amendments. The Government's citation of *Paul v. Virginia,* 8 Wall. 168 (1869), however, demonstrates the complete irrelevance of this line of authorities. Addressing itself squarely to the issue of a corporation's First Amendment rights, this Court in *Grosjean v. American Press Co., Inc.,* 297 U. S. 233, 244 (1936) answered the argument here advanced by the Government and expressly distinguished *Paul v. Virginia,* on the ground that the decision dealt solely with the Privileges and Immunities Clause, not the Due Process Clause, of the Fourteenth Amendment. Significantly, in *United States v. C. I. O.,* 335 U. S. 106 (1948), both the majority and concurring opinions assumed that corporations enjoy the full protection of the First Amendment, and concluded that the grave constitutional deficiencies of § 610 exist for corporations as well as labor unions.

In their attempted defense of § 610, moreover, both Respondent and the Government conveniently ignore the essential role of the First Amendment in the program of self-government established by the Constitution:

> "When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger. And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe, un-American as well as American. Just so far as, at any point, the citizens who are to decide an issue are denied



> acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed.* The principle of the freedom of speech springs from the necessities of the program of self-government."[4]

In sharp conflict with the First Amendment, the Government again argues—as it did in *United States v. C. I. O., supra,* and in *United States v. U. A. W.,* 352 U. S. 567 (1957)—that the mutilation of the thinking process of the community brought about by § 610's prohibition against expenditures for speech is necessary to avoid an "undue influence" (G. Br. at 23). It is submitted that, as a proposed justification of § 610's flat prohibition, the "undue influence" rationale did not survive the concurring opinion of Mr. Justice Rutledge in *United States v. C. I. O., supra,* 335 U. S. at 145-146.

The Government's confused attempt to defend the constitutionality of § 610 demonstrates only that § 610 is indefensible. On the one hand, the Government argues (G. Br. at 30) that "[t]he statutory scheme evidences the 'precision of regulation' which this Court has said to be the 'touchstone in an area so closely touching our most precious freedoms.'" On the following page of its brief (G. Br. at 31), however, the Government, with commendable candor, expressly admits that, far from evidencing the required "precision of regulation," the statute is *overbroad,* as Petitioners contend, and by its very terms prohibits conduct which is clearly protected by the First Amendment. The

4. A Meiklejohn, POLITICAL FREEDOM: *The Constitutional Powers of the People* 27.

Government concedes (G. Br. at 31) that in its application to corporate expenditures for "advertising dealing solely with issues" the "expenditure" provision of § 610 infringes "upon First Amendment values."[5] Having admitted that § 610 is overbroad because it prohibits constitutionally protected corporate expenditures for "advertising dealing solely with issues," the Government would be obliged to admit, as well, that § 610 is overbroad because it prohibits, by its terms, *labor union* expenditures for "advertising dealing solely with issues." Again, in view of *Mills v. Alabama*, 384 U. S. 214 (1966), in which the Court struck down an ordinance prohibiting election-day newspaper editorials endorsing political candidates, the Government would, of course, be obliged to admit that § 610 is also overbroad in its application to expenditures of a corporation owning a newspaper for the purpose of publishing such an editorial.[6] On the Government's reading of § 610, the criminal prohibition apparently extends to expenditures from a labor union's or corporation's general treasury, even if the members or stockholders unanimously consent to the expenditure. The "undue influence" rationale notwithstanding, § 610 by its terms is just as applicable, on the Government's view, to an expenditure for a one-dollar advertisement as it would be to a one-thousand-dollar advertisement.

5. In conceding that § 610 is overbroad because it prohibits corporate expenditures for "advertising dealing solely with issues," the Government, of course, admits, as well, the poverty of both the "undue influence" rationale and the so-called "minority protection" rationale. Each of these supposed "justifications" of § 610 "justifies" the very application of § 610 which the Government admits is unconstitutional.

6. At least one court has rejected the Government's theory, in that case, that there is any constitutionally significant difference between a paid political advertisement and a newspaper editorial endorsing a candidate. *United States v. National Committee for Impeachment*, 469 F. 2d at 1140, n. 12, 1142, n. 15.



The Government apparently takes the position (G. Br. at 31) that § 610 would be applicable where an advertisement "impliedly referred to a candidate." This position is, of course, inconsistent with the strong implication in the opinion of the Court in *United States v. U. A. W.*, 352 U. S. 567, 592 (1957) (in listing factors relevant to the constitutional issue) that § 610 would be unconstitutional if it makes criminal advertising which "simply state[s] the record of particular candidates on economic issues," which obviously entails referring to candidates by name. It is also apparently inconsistent with the position the Government took in *United States v. U. A. W., supra*.[7] What emerges from the Government's concession and the discussion in *U. A. W.* is that the Government cannot, consistent with the First Amendment, proscribe an expenditure for an advertisement which mentions the name of a candidate, states his record on economic issues and discusses those issues. The advertising involved in this case mentions the name of *no* political party or candidate for federal office and falls well within the scope of the protection afforded by the First Amendment.

Having conceded that § 610 is overbroad as it applies to expenditures for advertising which deals "solely with issues," the Government fails to provide any guide for determining where an advertisement stops dealing "solely with issues" and begins "impliedly referring to a candidate." What is constitutionally significant is that the statute itself provides no such guide either, in this area where "precision of regulation must be the touchstone," *N. A. A. C. P. v. Button*, 371 U. S. 415, 438 (1963), and

7. In its brief in *U. A. W.*, the Government cited, as an example of *permissible* expenditure under § 610, the expenditure of labor union funds for radio broadcasts "on the legislative issues, action of Congress, and the voting records of Congressmen on specific pieces of legislation." ("Brief for the United States" at 50). The Government cannot have it both ways.

where legislation must be narrowly drawn to meet the precise evil.

While conceding that § 610 is overbroad, the Government, in its brief (G. Br. at 29-30), relies on *Civil Service Commission v. Letter Carriers,* 413 U. S. 548 (1973), to support its contention that § 610's prohibition of expenditures for advertising of the kind involved here, does not violate the First Amendment.

Dealing with the question whether § 9(a) of the Hatch Act, 5 U. S. C. § 7324(a)(2), was, on its face, unconstitutionally vague and overbroad, the Court in *Letter Carriers,* emphasized throughout its opinion that the Hatch Act *specifically exempted* from the scope of its prohibitions expressions by federal employees of their opinions, publicly or privately, on political issues and candidates (413 U. S. at 561-62). While holding that the Hatch Act constitutionally proscribed "plainly identifiable acts of political management and political campaigning" (413 U. S. at 567), the Court stated (413 U. S. at 575-76):

> "Whatever might be the difficulty with a provision against taking 'active part in political management or in political campaigns,' the Act specifically provides that *the employee retains the right . . . to express his opinion on political subjects and candidates.*" (Emphasis added.)

But, it is precisely that expression of opinion that is flatly prohibited by § 610, according to the Government and the Respondent. Indeed, according to Respondent and the Court below, a corporation can express *no* opinion, can express nothing, with respect to public issues or candidates.

The Government misperceives the holding of the Court in *Letter Carriers* and its relevance to the case at bar. For, in *Letter Carriers* a regulatory scheme had been formulated



by the Civil Service Commission and engrafted onto the substantive provisions of the Hatch Act. Thus, statutory language, though itself vague and overbroad, became precise and the acts prohibited by it "easily identifiable." There is, however, no body of law, statutory, judicial or administrative, to rescue § 610 from the clearly unconstitutional vagueness and overbreadth which its attempted application in this case underscores. For these reasons, it is submitted that this Court should hold § 610 unconstitutional as violative of the First Amendment.

## V. CONCLUSION.

For all of the foregoing reasons, Petitioners respectfully request that the Judgment of the court below should be reversed.

Respectfully submitted,

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